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The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws

David P. Currie

The second labor was to go to Lerna and kill a creature with nine heads called the Hydra which lived in a swamp there. This was exceedingly hard to do, because one of the heads was immortal and the others almost as bad, inasmuch as when Hercules chopped off one, two grew up instead.

Hamilton's Mythology

In this country it is not just the evil that men do that lives after them; their goods are neither interred with their bones, nor gobbled up by the state,¹ nor left to the mercies of those into whose hands they fall. Assets must be collected; obligations of the departed must be satisfied; the residue must be distributed to his near and dear and to the local cat hospital. These tasks do not perform themselves, and it is too late for the late lamented to perform them. Thus, presto! Enter the executor, the administrator, the personal representative of the estate of the deceased.

The sensible thing to do would be to appoint one live person to do the whole job for one dead one. But unfortunately Mr. Bumble was right, as far as this branch of the law is concerned, for the demise of an individual with assets in more than one state gives rise to more than

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¹ But see 26 U.S.C. *passim*.

one administration. It is textbook law that "administration in each state, whether principal or ancillary, is separate and complete in itself. Legally each local administration is wholly independent of the others"²

The catalogue of specific rules said to flow from this principle is gruesome. An executor or administrator may neither sue nor be sued outside the state of his appointment. He may be unable to collect assets elsewhere even from those willing to surrender them. A judgment for or against one administrator is not binding in an action involving another administrator of the same decedent.

Academic views toward the problem of foreign representatives have not been static. Story, as one might suspect, wholeheartedly approved the independence of administrations in different states.³ Beale generally agreed but insisted that the forum might quite properly allow a foreign administrator to sue or to collect assets when its interests were not infringed.⁴ Goodrich proclaimed the logical necessity for separate administrations but was willing to bend his principles at every turn for the sake of "convenience."⁵ Leflar perceives "multiplicity," "inconvenience," and "economic waste" everywhere and seems to wish something could be done about it.⁶ Stumberg and McDowell advocate a single administration;⁷ Scoles would permit the representative to be sued wherever the deceased could have been.⁸ Ehrenzweig, who would throw out the entire business of separate administrations, tells us that the standard theory is based on a misconception of history and that today the foreign representative may generally be sued except in an inconvenient forum!⁹

Although the notion of separate administrations has been greatly eroded since Story's days, two recent decisions indicate that it has by no means been washed entirely away. *Van Dusen v. Barrack* concerned a motion for transfer of venue under 28 U.S.C. § 1404(a). Wrongful-death actions had been filed in a federal court in Pennsylvania; the defendants sought transfer to the District of Massachusetts. But the statute authorizes transfer only to a district in which the action originally "might have been brought." The plaintiffs were administrators and executors appointed in Pennsylvania; Massachusetts does not per-

² LEFLAR, *CONFLICT OF LAWS* 374 (1959).

³ STORY, *CONFLICT OF LAWS* §§ 507-29 (8th ed. 1883).

⁴ 3 BEALE, *CONFLICT OF LAWS* 1510-11, 1533 (1935).

⁵ GOODRICH, *CONFLICT OF LAWS* 556, 559, 568 (3d ed. 1949).

⁶ LEFLAR, *CONFLICT OF LAWS* 374, 375, 379-80 (1959).

⁷ STUMBERG, *CONFLICT OF LAWS* 400 n.6 (3d ed. 1963); MCDOWELL, *FOREIGN PERSONAL REPRESENTATIVES* 170 (1957) [hereinafter cited as MCDOWELL].

⁸ GOODRICH, *CONFLICT OF LAWS* 367 (4th ed. Scoles 1964).

⁹ EHRENZWEIG, *CONFLICT OF LAWS* 44-53, 60-64 (1962) [hereinafter cited as EHRENZWEIG].

mit actions by foreign representatives; and the Massachusetts rule is binding on the federal court there under rule 17(b) of the Civil Rules. Therefore, the Court of Appeals held, the District of Massachusetts was not one in which the action "might have been brought," and transfer must be denied.¹⁰ The Supreme Court reversed, deciding several fascinating issues of federal law; it did not dispute the premise that Pennsylvania administrators cannot sue in Massachusetts.¹¹

Hayden v. Wheeler was an Illinois action to recover for personal injuries suffered in an Illinois collision. This time it was the defendant, not the plaintiff, who was dead; the action was filed against an administrator appointed in Wisconsin. Section 17 of the Illinois Civil Practice Act provides that any person who commits a tortious act in Illinois submits himself "and, if an individual, his personal representative," to suit there. The trial court dismissed for want of jurisdiction, and the Appellate Court, Second District, affirmed: "Personal representative" in section 17 means "agent, employee or representative of a living person or individual."¹²

People have been protesting in print about this sort of nonsense for years. And, fortunately, the Illinois Supreme Court reversed *Hayden v. Wheeler*.¹³ But so long as courts continue to render decisions like that of the lower court in *Hayden* there will be room for one more groan from the ivory towers. The problem of the foreign representative, like Everest, has already been climbed; but it is still there.

I. SUITS BY THE FOREIGN REPRESENTATIVE

At common law the foreign representative could not sue. "His official capacity cloaked him only within the state; outside the state he was merely a private individual"¹⁴ He was said to have no authority¹⁵ or title¹⁶ outside the state of appointment. This suggests a constitutional limitation, to which I shall return, on the appointing state's power, but it does not explain why other states should refuse to grant him local authority to sue. The reason usually found is that permitting the representative to remove assets from the jurisdiction would be detrimental to local creditors.¹⁷

This is a feeble argument. To begin with, the policy of keeping the

¹⁰ 309 F.2d 953 (1962).

¹¹ 376 U.S. 612 (1964).

¹² 51 Ill. App. 2d 396, 398, 201 N.E.2d 242, 243 (1964).

¹³ 33 Ill. 2d 110, 210 N.E.2d 495 (1965).

¹⁴ LEFLAR, *CONFLICT OF LAWS* 375 (1959).

¹⁵ See, e.g., 3 BEALE, *CONFLICT OF LAWS* 1533 (1935).

¹⁶ See, e.g., GOODRICH, *CONFLICT OF LAWS* 553 (3d ed. 1949).

¹⁷ See, e.g., *Ghilain v. Couture*, 84 N.H. 48, 52, 146 Atl. 395, 398 (1929); STORY, *CONFLICT OF LAWS* § 512 (8th ed. 1883).

goods at home is quite imperfectly observed. It is usually held, for example, that a foreign representative may sue on a judgment he has recovered, or on a cause of action arising out of his activities on behalf of the estate, because these claims belong to him "as an individual."¹⁸ This avoids the problem of his nonexistence as an administrator, but it is arrant nonsense since any recovery is for the benefit of the estate. What is more important, permitting such suits allows assets to be withdrawn from the state; and this is also true of the many decisions permitting an assignee of the representative to sue.¹⁹

Moreover, the local creditors do not deserve such protection. If the administrator is from one of the United States, there is no danger that his withdrawal of the assets would leave local creditors without remedy, for the Constitution forbids discrimination against them in the courts of the appointing state.²⁰ For the same reason, keeping assets in the forum state cannot preserve them for the exclusive benefit of local creditors. What the creditors gain by requiring ancillary administration is a more convenient forum, and this can be assured without refusing to allow suit by requiring the posting of a bond as a condition to the foreign administrator's suit,²¹ if the concern with removal of assets is legitimate. In addition, I have never thought that the presence of property justified suit in an otherwise inappropriate forum;²² and even assuming that jurisdiction quasi in rem is proper, a living debtor

¹⁸ See, e.g., *Hare v. O'Brien*, 233 Pa. 330, 82 Atl. 475 (1912) (judgment); McDOWELL 38-50; RESTATEMENT, CONFLICT OF LAWS § 508 & comments a & b (1934).

¹⁹ E.g., *Petersen v. Chemical Bank*, 32 N.Y. 21 (1865). See McDOWELL 65.

The cases permitting a defendant to waive the representative's incapacity, see McDOWELL 35-38, are also hard to reconcile with the policy behind the rule. It is odd to rely on a debtor of the deceased to enforce a rule designed to protect the deceased's creditors, especially since it may not be in the debtor's interest to postpone the inevitable suit until the appointment of an ancillary administrator.

On the other hand, decisions allowing a foreign representative to sue for wrongful death are quite consistent with the policy against withdrawal of assets, if, as is often the case, the statute makes the money recovered unavailable to the decedent's creditors. E.g., *Ghilain v. Couture*, 84 N.H. 48, 53, 146 Atl. 395, 398 (1929). Moreover, although a foreign representative is often permitted to collect assets or debts from those willing to pay without a lawsuit, it is frequently suggested that the debtor will not be discharged by such payment if he has reason to know of the existence of local creditors or of the appointment of a local administrator. See *Wilkins v. Ellett*, 108 U.S. 256 (1883); GOODRICH, CONFLICT OF LAWS 361 (4th ed. Scoles 1964); McDOWELL 162-63; RESTATEMENT, *op. cit. supra* note 18, §§ 475, 482.

²⁰ Cf. *Blake v. McClung*, 172 U.S. 239 (1898). Foreign corporations are not "citizens" under the privileges and immunities clause, but they are entitled to the same treatment under the equal protection clause. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923).

²¹ Some states have done this. See McDOWELL 69-70.

²² See D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 584.

is free to make the creditors travel by removing his assets from the state. The presence of estate property should be neither necessary for jurisdiction if the forum is appropriate, nor sufficient if it is not.

The rule forbidding foreign personal representatives to sue, therefore, serves no legitimate interest. In addition, it does impose considerable burdens on the collection and distribution of estate property.²³ Extra time and money are required to obtain ancillary letters. Keeping the assets where local creditors can get them entails separate administration in each state. Even if, as statutes often provide, multiple litigation over inheritance may be avoided by transmitting assets to the domicile state once creditors are satisfied,²⁴ multiple administration means still more time, effort, and money, and perhaps inconsistent court directions for the conservation or operation of a multistate estate. It is also easily possible, especially since some states forbid appointment of nonresidents as representatives,²⁵ that different individuals may be appointed in different states to represent a single decedent; this greatly enhances the chances of wasted effort, conflict, and confusion.

Accordingly, each state ought to permit suits by foreign representatives. McDowell reports that roughly half the states do so at least in some cases.²⁶ In a number of these, however, the foreign representative may sue only if there is no local administration, and in other states, as illustrated by *Van Dusen v. Barrack*,²⁷ he may not sue at all.

But the best answer to *Barrack* would have been that Massachusetts was a district in which the action "might have been brought" because the state law forbidding suits by foreign administrators violates the full faith and credit clause of the Constitution. The decree appointing the representative results from a "judicial proceeding," as required by the Constitution, and it gives the administrator title to the decedent's assets. To refuse to permit him to sue is to disparage his title and therefore to deny full credit to the decree. Recognition of the appointment is supported also by the national policy the Supreme Court has found

²³ See McDOWELL 172-75. See Alford, *Collecting a Decedent's Assets Without Ancillary Administration*, 18 S.W.L.J. 329 (1964), for a detailed discussion of the problems of collecting assets under the existing law.

²⁴ E.g., OHIO REV. CODE ANN. § 2129.23 (Baldwin 1964); OKLA. STAT. ANN. tit. 58, § 633 (1965).

²⁵ E.g., ILL. REV. STAT. ch. 3, § 94 (1965); OHIO REV. CODE ANN. § 2113.06 (Baldwin 1964). See AMERICAN COLLEGE OF PROBATE COUNSEL, RIGHTS OF NONRESIDENT (INDIVIDUAL) CITIZEN TO ACT AS FIDUCIARY UNDER THE LAWS OF VARIOUS STATES (1963), listing nineteen states with residency requirements for ancillary administrators. Ohio, however, avoids the problem by allowing foreign administrators to sue, OHIO REV. CODE ANN. § 2113.75 (Baldwin 1964), as does Illinois in many cases, ILL. REV. STAT. ch. 3, § 265 (1965).

²⁶ McDOWELL 67-75.

²⁷ 376 U.S. 612 (1964).

in favor of transitory causes of action,²⁸ and it impairs no important policy of the recognizing state because local creditors may sue elsewhere without fear of discrimination.

There are difficulties with this suggestion. The most obvious is that under present law the appointing state may not intend to give the administrator title to assets in other states, but that can be remedied by state legislation. There is a more fundamental problem. The appointing state traditionally has no *in rem* power over foreign property, and it may lack the contacts ordinarily necessary to bind absent parties *in personam*.²⁹ And of course if the appointing court lacks jurisdiction to give its administrator authority over foreign assets, the full faith clause does not require other states to recognize his right to sue for them.³⁰

But the ultimate question is whether the exercise of jurisdiction is fundamentally unfair,³¹ and the contacts required by fair play ought to be proportioned both to need and to cost: to the interests of the states and to the respective degrees of hardship that would be caused by the denial of jurisdiction and by its exercise. The appointment of a representative and the assertion of jurisdiction to distribute the estate serve the purpose of the domiciliary state's law to carry out the decedent's wishes or to care for his dependents. This can be done piecemeal, as under the present system of multiple administrations, but the cost, adumbrated above, is substantial.

On the other side of the scale, the hardship caused by appointing a universal administrator seems slight. Although the appointment of the universal administrator may take place in a state inconvenient to some interested parties, it is not clear that they lose anything of much value by it, since the representative is a fiduciary obliged to look out for the interests of all. The inconvenience of having to enforce fiduciary duties in a remote forum is relevant, but it does not seem overpowering. The choice of a forum for distributing assets, on the other hand, does affect a matter of substance, and it may seem hard that a Hawaii legatee must travel to Maine to present his case. Yet ancillary administration is no guarantee that he need not; it makes it not unlikely that, in order to realize his full claim when assets are located in several states, he must travel not only to Maine but to Alabama, Alaska, and Arizona as well. Any convenience to claimants arising from the practice of splintered

²⁸ See *Hughes v. Fetter*, 341 U.S. 609 (1951); *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914).

²⁹ See *Hanson v. Denckla*, 357 U.S. 235 (1958).

³⁰ Absent at least a reasonable opportunity to litigate the issue of jurisdiction. See *Durfee v. Duke*, 375 U.S. 106 (1963).

³¹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See text accompanying notes 90-94 *infra*.

administrations is purely coincidental, as jurisdiction is irrelevantly defined simply in terms of the location of property.

It is true that *International Shoe Co. v. Washington*³² assesses the fairness of jurisdiction in terms of "minimum contacts" and that *Hanson v. Denckla* quite properly imposes a general requirement that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State."³³ It is also true that unitary administration may cut off the rights of people who have no contact whatever with the appointing state. But *Atkinson v. Superior Court* suggests,³⁴ and *Williams v. North Carolina (I)* holds,³⁵ that if the need for a forum is sufficiently great and the cost to absent parties sufficiently small, no contact at all is required. I think that test is met here.

The Kansas Supreme Court, in recently holding universal succession unconstitutional, believed the result compelled by decisions of the United States Supreme Court.³⁶ I do not think it was. The Supreme Court has unequivocally upheld the jurisdiction of the state where assets are located to administer them, but in a case involving no prior universal appointment.³⁷ It has permitted collateral attack by the situs state on a finding of domicile made in foreign probate proceedings,³⁸ but that is consistent with jurisdiction of the domicile to administer absent property.³⁹ There are also a fair number of dicta in older deci-

³² 326 U.S. 310 (1945).

³³ 357 U.S. 235, 253 (1958).

³⁴ 49 Cal. 2d 338, 316 P.2d 960 (1957). In *Atkinson* itself there was even less hardship than would be caused by universal appointment, as the absent trustee apparently was a disinterested stakeholder with nothing to lose. Further, his acceptance of the position probably constituted sufficient contact with the forum state to pass muster even if he had something at stake. Finally, the opinion rested in part on holding all the property in issue to be in California—a factor of immense traditional importance that distinguishes the troublesome *Hanson v. Denckla*. But the language of the opinion suggests that *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), which forbade interpleader against an absent, interested claimant, was erroneous. I would not limit interpleader to the state of situs, for the contacts of the claimants seem more significant in terms of convenience and state interest than the location of the res. Jurisdiction seems proper in a state in which one claimant could have been sued to determine liability if there had been no competing claims. Indeed, jurisdiction anywhere else is arguably improper: though it is necessary to expose some claimants to hardship in order to avoid multiple payment, it is not necessary to expose them all.

³⁵ 317 U.S. 287 (1942).

³⁶ *In re Estate of De Lano*, 181 Kan. 729, 315 P.2d 611 (1957).

³⁷ *Iowa v. Slimmer*, 248 U.S. 115 (1918).

³⁸ *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917); *Overby v. Gordon*, 177 U.S. 214 (1900).

³⁹ Compare *Williams v. North Carolina (I)*, 317 U.S. 287 (1942), with *Williams v. North Carolina (II)*, 325 U.S. 226 (1945). Moreover, in *Overby v. Gordon*, 177 U.S. 214 (1900), the Court held the appointment was not intended to have extraterritorial effect, and the hold-

sions still less in point that reflect adversely on the domicile's power to appoint a universal representative,⁴⁰ but the Court has neither held nor declared that such an appointment would be unconstitutional. The most adverse case is *Hanson v. Denckla*,⁴¹ which denied the domicile jurisdiction in rem or in personam to decide, as against an absent trustee, whether the decedent had effectively exercised an inter vivos power of appointment over foreign property. By its result, by its stress on the traditional in rem and in personam categories, and by ignoring a dissent that argued the trustee had no stake in the outcome, *Hanson* cast considerable doubt on the constitutionality of single administration. It is some comfort, however, that the Court viewed the question before it as collateral to administration: "Whatever the efficacy of a so-called 'in rem' jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts."⁴²

Such is the authority against the constitutionality of a single personal

ing (or dictum) in *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403-04 (1917), that personal service did not give jurisdiction to foreclose the issue of domicile was based on an unreconstructed view of *Pennoyer v. Neff*, 95 U.S. 714 (1878). *Riley v. New York Trust Co.*, 315 U.S. 343 (1942), held that a New York "administrator," seeking taxes on behalf of the state, was not a party or privy under Georgia law. The Court's emphasis in *Riley* on a state's interest "in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries," 315 U.S. at 355, does not suggest that the situs has exclusive jurisdiction.

⁴⁰ *Smith v. Union Bank*, 30 U.S. (5 Pet.) 518 (1831), held that priorities among creditors were governed by the law of the situs (which was also the forum), not that of the domicile, partly because assets within a territory are subject to its laws. In dictum the Court added that an arrangement whereby each state relinquished its power to administer to the domicile exclusively and gave the representative ubiquitous powers "would most materially interfere with the exercise of sovereign right, as at present generally asserted and exercised." *Id.* at 527.

Vaughan v. Northup, 40 U.S. (15 Pet.) 1 (1841), held a foreign executor immune from suit outside the appointing state. The result is quite consistent with unitary administration, but there is a hostile dictum by, of course, Mr. Justice Story that: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it It cannot confer, as a matter of right, any authority to collect assets of the deceased, in any other state" *Id.* at 5. The Constitution was not mentioned.

Blackstone v. Miller, 188 U.S. 189 (1903), allowed New York to tax the succession of debts owed by New Yorkers to an Illinois decedent. By its dictum that domiciliary law governs distribution only by comity, the Court suggested the situs has considerable powers beyond that of taxation. But if the power to tax is analogous to the power to administer, *Blackstone* is weak authority for exclusive situs jurisdiction, for it assumed and has been cited as establishing the concurrent taxing power of the state of domicile. See *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 400 (1917).

⁴¹ 357 U.S. 235 (1958).

⁴² *Id.* at 248.

representative. On the other side, as Professor Cheatham has shown, the Supreme Court has held that the closely analogous appointment of a statutory successor to a corporation is entitled to full faith and credit as regards foreign assets and that the successor must be permitted to sue in other states.⁴³ It is true that the Court in an early case took pains to distinguish the corporate successor from the administrator,⁴⁴ but the distinction is not persuasive. Surely whether the representative is a "state officer" rather than a "court officer," as pointed out by the Court, cannot affect the fairness of his appointment. The Court called the successor a "trustee," but, unlike the ordinary trustee, the successor was said to have both individual and official capacities, and this split personality was often given as a reason for the administrator's immunity.⁴⁵ The Court's third ground for distinction was that: "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. . . . Every person who deals with it everywhere is bound to take notice of its provisions" ⁴⁶ But the interest of the state of incorporation in unified administration of winding up of corporations is matched by the interest of the domicile in winding up the affairs of a decedent. The argument that those who deal with foreign corporations take their chances is essentially circular, since expectations in such cases depend largely upon the state of the law. The question really boils down to whether the assertion of jurisdiction to appoint a universal successor is fair, and it seems no less so in the case of a deceased individual than in the case of a deceased corporation.

The corporate analogy suggests, and I have so far argued, that the universal representative should be appointed by the state where the decedent was last domiciled. This has its disadvantages. First, litigation over domicile and the possibility of collateral attack on the appointing state's jurisdiction work counter to the policy of getting the estate finally and promptly settled. Moreover, to deny administrative jurisdiction to other states in which the deceased left assets leaves them without assurance that the assets will be efficiently distributed and prevents them from applying their own laws of distribution.⁴⁷ All these problems would be avoided by permitting any state where there is property

⁴³ Cheatham, *The Statutory Successor, the Receiver and the Executor in Conflict of Laws*, 44 COLUM. L. REV. 549 (1944), citing *inter alia*, *Converse v. Hamilton*, 224 U.S. 243, 261 (1912).

⁴⁴ *Relfe v. Rundle*, 103 U.S. 222, 225 (1881).

⁴⁵ See Cheatham, *supra* note 43, at 553-54.

⁴⁶ *Relfe v. Rundle*, 103 U.S. 222, 226 (1881).

⁴⁷ Mississippi, for example, has so far been permitted to apply the law of the situs to questions of distributing movables, contrary to the usual rule of domicile. MISS. CODE ANN. § 467 (1957). See LEFLAR, *CONFLICT OF LAWS* 355 (1959).

to appoint a successor, the first appointee to be the sole representative of the estate, but this would create other difficulties. Administration of the entire estate in a state where there is a minimum of property seems incongruous. It may be inconvenient for almost everybody and, because most courts apply the law of the domicile to determine distribution, it would often necessitate application of foreign law. It seems more appropriate, despite the drawbacks, to allow universal administration in the state of domicile. Apart from escheat, taxation, and testamentary dispositions restraining the alienability of property, the situs is not likely to have an interest in distribution.⁴⁸ It does not seem likely that assets will lie idle for failure of the domicile to appoint an administrator, and the corporate analogy suggests that the situs may avoid any such difficulty by appointing a local custodian whose appointment is superseded by that of the domiciliary representative.⁴⁹

In summary, the state of a decedent's domicile ought to appoint a personal representative with title to assets wherever located, and full faith and credit to this appointment should permit him to sue in other states. In any event, each state of its own volition ought to allow foreign representatives to sue, because a refusal to allow suit causes added trouble and expense without serving any legitimate policy.⁵⁰

⁴⁸ See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095 (1965).

⁴⁹ See Relfe v. Rundle, 103 U.S. 222 (1881). See Note, *Unitary Administration of Decedents' Intangibles*, 50 MINN. L. REV. 129, 140-46 (1965), advocating exclusive domiciliary administration of all intangibles.

⁵⁰ Appointment of a universal representative would also do away with the traditional rule that judgments for or against one administrator are not binding in actions by or against other administrators of the same decedent. *E.g.*, *Ingersoll v. Coram*, 211 U.S. 335 (1908); *Nash v. Benari*, 117 Me. 491, 105 Atl. 107 (1918); RESTATEMENT, CONFLICT OF LAWS §§ 510-11 (1934). This rule makes no sense even under a scheme of separate administrations, and it is subject to exceptions that ought to swallow the rule. First, the courts have stopped short of requiring a debtor to pay more than one representative, explaining inconsistently that the second administrator cannot sue on the other's judgment because he was not a party or privy and that he cannot sue on the original cause of action because it is merged in the judgment, which is "conclusive between the parties." *Hare v. O'Brien*, 233 Pa. 330, 335, 82 Atl. 475, 477 (1912). Moreover, the Supreme Court long ago weakened the traditional rule by holding that a judgment rendered against an executor in one state will be binding on the same man as executor in another, on the irrelevant ground that an executor, unlike an administrator, derives his appointment from the will instead of the court. *Carpenter v. Strange*, 141 U.S. 87 (1891). So long as we have separate administrations, I join the chorus suggesting that in all these cases one litigation is enough. See, *e.g.*, EHRENZWEIG 225-26; STUMBERG, CONFLICT OF LAWS 405 (3d ed. 1963); Scoles, *Conflict of Laws and Creditors' Rights in Decedents' Estates*, 42 IOWA L. REV. 341, 349-54 (1957). Each representative, since he is a fiduciary for the estate, can be expected to speak for its interests fairly and can be surcharged if he does not.

II. SUITS AGAINST FOREIGN ADMINISTRATORS

The Law

The textbook rule is that an administrator cannot be sued outside the state of his appointment to recover on an obligation of the decedent. This doctrine is proclaimed with gusto by Story, by Beale and his Restatement, and by Goodrich; it is found in Professor Stumberg's book; and as late as 1959 Professor Leflar felt able to say that the "common law rule that actions cannot be brought against them is still generally in force."⁵¹ A great many decisions from a large number of states, most of the decisions relatively ancient, state the rule just as broadly as this.⁵²

The common law immunity of a foreign representative has been often criticized, but Professor Ehrenzweig seems to be the first to doubt that it is "still the law":

At least eight states have, with or without modifications, established by statute the foreign administrator's general standing to be sued. At least seven states have recognized this standing with regard to the (probably most important) case of the decedent non-resident motorist. At least twelve other states have a common law recognizing general personal jurisdiction either upon mere service within the state or upon consent by appearance or otherwise. And what appears as the majority of the remaining jurisdictions will permit the foreign administrator to be sued if he is domiciled in the forum state or if the suit concerns assets brought into that state. Many will permit the administrator to be substituted as a defendant in a suit commenced during the decedent's life time. . . . [T]hose cases usually relied upon to defeat the foreign administrator's standing to be sued, which are not superseded by later developments, are limited to a small minority of states, and in addition quite often explainable as designed to obviate abuse of the transient rule of personal jurisdiction.⁵³

He concludes that, except for cases in which the immunity role serves the purpose of forum non conveniens, "foreign administrators and ex-

⁵¹ LEFLAR, *CONFLICT OF LAWS* 376 (1959); 3 BEALE, *CONFLICT OF LAWS* 1552 (1935); GOODRICH, *CONFLICT OF LAWS* 562 (3d ed. 1949); *RESTATEMENT, CONFLICT OF LAWS* § 512 (1934); STORY, *CONFLICT OF LAWS* § 513 (8th ed. 1883); STUMBERG, *CONFLICT OF LAWS* 405 (3d ed. 1963).

⁵² E.g., *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1 (1841); *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44 (1898); *Greer v. Ferguson*, 56 Ark. 324, 19 S.W. 966 (1892); *Judy v. Kelley*, 11 Ill. 211 (1849); *Hargrave v. Turner Lumber Co.*, 194 La. 285, 193 So. 648 (1940).

⁵³ EHRENZWEIG 62-64.

ecutors can ordinarily be sued . . . generally like any other individuals, subject only to the rules governing personal jurisdiction."⁵⁴

The authorities Ehrenzweig cites do not support this conclusion. Instead of thirteen states in which statutes⁵⁵ or decisions⁵⁶ permit repre-

⁵⁴ *Id.* at 61-62.

⁵⁵ Ehrenzweig begins by stating that eight states have "established by statute the foreign administrator's general standing to be sued," but a careful reading of his own footnotes reduces the number to five. In the middle of an unrelated footnote on the next page he inconspicuously discloses that two of the eight states with "general statutes"—Kansas and New Jersey—"have limited their applicability" to cases concerning "assets brought into that state." *Id.* at 63 n.15. This brings those states into a well-recognized and rather narrow exception to the immunity rule that Ehrenzweig treats separately in the following sentence. He appends to his citation of the Oklahoma statute the cryptic comment: "(permissive)," which makes sense only if it means that the administrator cannot be sued without his consent. *Id.* at 62 n.10. This again falls short of making him as suable as anyone else.

A little research discloses more. The Oklahoma statute, OKLA. STAT. tit. 58, § 262 (1961), indeed seems permissive: "It shall be lawful" for a foreign representative "to maintain or defend any suit or action . . ." Perhaps this was intended to mean the same as Kansas' provision, KAN. GEN. STAT. ANN. § 59-1708 (1949), that he "may sue or be sued." But the use of active rather than passive voice is an invitation to the courts to construe the statute as removing disability but not immunity, allowing suit only against consenting representatives. Cf. FLA. STAT. § 734.30(2) (1961): "Personal representatives appointed in any state or country may be sued in this state with reference to property, real or personal, in this state, and may defend any suit, action or proceeding in any court of this state." Whether the Oklahoma statute would be held to permit suit against an unconsenting administrator is doubtful. And, although Ehrenzweig does not tell us, the North Dakota and Wisconsin statutes, which he cites as generally removing immunity, are almost identical: both provide that the foreign representative "may defend" actions as well as maintain them. N.D. CENT. CODE ANN. § 30-24-18 (1960); WIS. STAT. § 287.16 (1961).

The New Mexico and Ohio statutes, N.M. STAT. ANN. § 31-2-9 (1953) and OHIO REV. CODE ANN. §§ 2113.70-.71 (1958), are explicit and to the point: representatives elsewhere appointed "may be sued" or "may be prosecuted." An ancient *nisi prius* decision upheld jurisdiction under the Ohio statute on the basis of service in the state, *Craig v. Toledo, A.A. & N.M.R.R.*, 2 Ohio N.P. 64 (Lucas Co. C.P. 1895), but a federal district court decision, cited by Ehrenzweig in another connection, *EHRENZWEIG* 62 n.11, held to the contrary, apparently intending to limit the statute to cases in which there were assets in Ohio. *Feldman v. Gross*, 106 F. Supp. 308 (N.D. Ohio 1952). New Mexico's statute was unconstrued when Ehrenzweig wrote. In 1964 the Supreme Court of that state strongly intimated, in dismissing an action that was ripe for *forum non conveniens* treatment, that the capacity statute applied only when there were assets in the state. *State ex rel. Scott v. Zinn*, 74 N.M. 224, 392 P.2d 417 (1964).

The final state is Iowa, which never had a general capacity statute. The statute Ehrenzweig cites, IOWA CODE ANN. § 321.498 (1958), was limited to automobile accident cases, and subsection (4), dealing with foreign administrators, was repealed eight years before Ehrenzweig's book was first published, IOWA ACTS 1951, ch. 133, § 1, after it had been held unconstitutional by a federal court. *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947).

⁵⁶ Ehrenzweig informs us that the common law of five other states authorizes "general personal jurisdiction upon mere service within the state." From Tennessee he relies on *Whittaker v. Whittaker*, 78 Tenn. 93 (1882), wherein the court said: "It is well settled in this State that a foreign administrator or executor cannot be sued as such." *Id.* at 97. Suit was allowed against an Illinois administrator resident in Tennessee, who had converted

sentatives to be sued as freely as anyone else, he has uncovered two or three. The "many states" permitting the foreign administrator to be substituted as a defendant in a suit commenced during the defendant's

the estate's assets to his own use: "[I]t is equally well settled that if a foreign administrator or executor comes within the jurisdiction of our courts, bringing with him funds or property belonging to the trust estate, he may be held to account here as trustee for those entitled to the effects in his hands . . ." *Ibid.*

From Mississippi, Ehrenzweig cites *Cutrer v. Tennessee ex rel. Leggett*, 98 Miss. 841, 54 So. 434 (1911), a suit against a Tennessee administrator who had taken estate property to Mississippi, where he resided, and refused to distribute it. The court distinguished earlier authority as announcing only "the general well-settled rule that an administrator, appointed by the courts of another state, cannot sue or be sued, as such in this state." *Id.* at 853, 54 So. at 437. Could the administrator be sued in this case? "There could be but one answer to this query, if it were not for the fact that it is alleged in the bill that the property in question was brought into this state and here wrongfully converted to the individual use of the administrator." *Id.* at 849, 54 So. at 436. Ehrenzweig to the contrary notwithstanding, it is clear the answer the court had in mind was "no."

From Georgia, Ehrenzweig cites *Johnson v. Jackson*, 56 Ga. 326 (1876), where the opinion writer remarked that he would like to hold that executors are no different from anyone else: "If they come within the jurisdictional limits of the state, they may be sued in any county in the state in which they may happen to be at the time when sued." *Id.* at 328. But the writer acknowledged on the next page that he spoke only for himself, not for the court; the case stands only for the familiar proposition that distributees may sue a resident-but-foreign-appointed administrator for assets he has brought into the state and misused, in order to prevent a failure of justice.

From Kentucky, Ehrenzweig cites three cases. In *Hussey v. Sargent*, 116 Ky. 53 (1903), a representative appointed in New Hampshire and domiciled in Kentucky sued to construe a will. The court ordered him to account for assets he had brought to Kentucky, citing numerous authorities holding that a representative cannot be sued outside the state of his appointment "for a failure to carry out the trust imposed upon him," and stating that the Kentucky rule is otherwise. *Id.* at 74. *Kenningham v. Kenningham's Ex'r*, 139 Ky. 666, 71 S.W. 497 (1903), allowed suit against a foreign executor to recover a legacy, without saying whether either estate property or the executor's residence was in Kentucky. In *In re Paine's Estate*, 128 Fla. 151, 174 So. 430 (1937), a suit to enforce a Kentucky judgment against a Florida representative, the Florida court held that Kentucky law permitted suits for assets taken to Kentucky and suits against the representative "ex maleficio," but not suits on a claim against the deceased for waste of timber.

Overlooking as not authoritative the Florida decision that contradicts Ehrenzweig, one might almost agree that on the basis of these cases alone Kentucky permits the foreign representative to be sued generally. Another writer has made the same contention on the basis of *Davis v. Connelly's Ex'rs*, 43 Ky. (4 B. Mon.) 136 (1843), which only upholds jurisdiction (in Ohio) over a consenting executor. See Comment, *The Amenability to Suit of Foreign Executors and Administrators*, 56 COLUM. L. REV. 915, 931 n.138 (1956). But two judges who ought to know have flatly said that prior to the extension of the non-resident-motorist statute to personal representatives in 1954, foreign representatives could not be sued in Kentucky. *Parrott v. Whisler*, 313 F.2d 245, 247 (6th Cir. 1963); *Williams v. Carter Bros. Co.*, 390 S.W.2d 873, 874 (Ky. 1965). And in *Riggs v. Schneider's Ex'r*, 279 Ky. 361, 130 S.W.2d 816 (1939), the highest court in Kentucky refused to permit revivor of an action against the Ohio executor of a nonresident motorist who had died after commencement of the action. The court might have held simply that the statute did not authorize out-of-state service of process on personal representatives, but it chose instead to regard as determinative "the right of revivor generally against a foreign

life turn out to be none at all.⁵⁷ Cases upholding jurisdiction over consenting or resident defendants, or for suits concerning assets in the forum state, are a far cry from allowing foreign administrators to be sued "generally like any other individuals," for most people can be sued, without their consent, wherever they can be served.

Yet the immunity rule is in fact undergoing a surprisingly extensive and rapid erosion. While Ehrenzweig in 1962 cited only seven states that had extended their nonresident-motorist statutes to personal representatives,⁵⁸ at least thirty-two and the District of Columbia had done so by 1965.⁵⁹ Though most do not expressly say so, these have uniformly

executor of a non-resident." *Id.* at 363, 130 S.W.2d at 817. On that question, the court said, Kentucky law was as follows: "[A] foreign administrator present in this State may be sued here by the persons entitled to assets in the hands of the administrator, but in *Baker v. Smith*, 3 Metc. 264, the court, while recognizing this rule, held that it had never been extended further than this and that no action could be maintained against such foreign administrator in the courts of this State by a creditor of his intestate." *Id.* at 363-64, 130 S.W.2d at 817.

Ehrenzweig is probably right that the Pennsylvania courts have abolished immunity altogether. Early decisions, including *Evans v. Tatem*, 9 S. & R. 252 (Pa. 1823), cited by Ehrenzweig, were very encouraging; a later hostile decision, *Magraw v. Irwin*, 87 Pa. 139 (1878), was still later explained away as holding only that "an administrator is not chargeable with assets in another state which have never been within his control." *Laughlin v. Solomon*, 180 Pa. 177, 183, 36 Atl. 704, 705 (1897). *Laughlin* declared that: "[A] foreign executor within the jurisdiction of our courts is liable to suit by a resident creditor of his decedent, and such suit will be sustained unless it trenches unduly on the jurisdiction of another court already attached, or would expose parties subject to such jurisdiction to inequitable burdens." *Id.* at 183, 36 Atl. at 706. See *Giampalo v. Taylor*, 335 Pa. 121, 126, 6 A.2d 499, 502 (1939), cited by Ehrenzweig, refusing to revive an action after the defendant's death because the foreign executor, in contrast to the one in *Laughlin*, had not been served with process in Pennsylvania. The federal district court for Middle Pennsylvania agrees that there is no immunity, *Brown v. Hughes*, 136 F. Supp. 55 (M.D. Pa. 1955) (dictum); that for Eastern Pennsylvania reads *Laughlin* as requiring assets in the forum state but presuming there are such assets until it is proved otherwise. *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677, 688 (E.D. Pa. 1958). This is a strained and narrow reading.

⁵⁷ Ehrenzweig cites only "Anno., 77 A.L.R. 251, 256," a subtitle of which is "Jurisdiction to render judgment against executor or administrator in proceeding commenced by him or the decedent." Not one of the cases there described permitted substitution of an unwilling foreign representative for a deceased defendant; the question was whether the representative's appearance as a plaintiff authorized the court to entertain a counterclaim against him.

⁵⁸ EHRENZWEIG 62 n.11.

⁵⁹ ALA. CODE tit. 7, § 199 (1960); ARK. STAT. ANN. §§ 27-342.1-27-342.3 (1962); CAL. VEHICLE CODE § 17450-56; CONN. GEN. STAT. REV. § 52-62 (Supp. 1961); DEL. CODE ANN. tit. 10, § 3112 (Supp. 1964); D.C. CODE ANN. § 40-423 (1961); FLA. STAT. ANN. § 47.29 (Supp. 1964); GA. CODE ANN. § 68-810 (1957); IND. ANN. STAT. § 47-1043 (Supp. 1964); KAN. GEN. STAT. ANN. § 59-102 (Supp. 1961); KY. REV. STAT. ANN. § 188.020 (1963); LA. REV. STAT. ANN. § 13-3474 (Supp. 1964); MD. ANN. CODE art. 66½, § 115 (1957); MASS. ANN. LAWS ch. 90, § 3A (Supp. 1964); MICH. STAT. ANN. § 9.2103 (1960); MINN. STAT. § 170.55 (1961); MISS. CODE ANN. § 9352-61 (Supp. 1964); MO. ANN. STAT. § 506.210 (1952); NEB. REV. STAT. § 25-530 (Supp. 1961); N.J. STAT. ANN. § 39:7-2 (1961); N.M. STAT. ANN. § 64-24-3 (1960);

been held to include foreign-appointed representatives, and nearly all that have been tested have been upheld as so applied.⁶⁰ Immunity remains in many of these states, apart from automobile cases. But no more here than in suits against living defendants is there any excuse for special treatment of automobile cases, except that their frequency makes them an early subject of legislative concern. Consequently most of the increasing crop of general long-arm statutes provide that a non-resident who does certain things in the state subjects himself and his "personal representative,"⁶¹ or sometimes his "executor or administrator,"⁶² to jurisdiction. I have found eighteen of these, five of them in states that had not previously done away with immunity on automobile cases. Add those states of Professor Ehrenzweig's which really have generally permitted suits against foreign representatives,⁶³ and it is fair to

N.Y. VEHICLE & TRAFFIC LAW § 253; N.C. GEN. STAT. § 1-105 (Supp. 1965); N.D. CENT. CODE § 39-01-11 (1960); OHIO REV. CODE ANN. § 2703.20 (Baldwin 1964); OKLA. STAT. tit. 47, § 391 (1961); PA. STAT. ANN. tit. 75, § 2001 (1960); S.D. CODE § 33.0809 (Supp. 1960); TENN. CODE ANN. §§ 20-224—20-226 (1956 & Supp. 1965); TEX. REV. CIV. STAT. art. 2039a (1964); VA. CODE ANN. § 8-67.1 (1957); WIS. STAT. ANN. § 345.09 (Supp. 1965); WYO. STAT. ANN. § 1-52 (Supp. 1965).

⁶⁰ *Milam v. Sol Newman Co.*, 205 F. Supp. 649 (N.D. Ala. 1962); *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943); *Parrott v. Whisler*, 313 F.2d 245 (6th Cir. 1963) (Kentucky statute); *Williams v. Carter Bros.*, 390 S.W.2d 873 (Ky. 1965); *Toczko v. Armen-tano*, 314 Mass. 474, 170 N.E.2d 703 (1960); *Plopa v. Dupre*, 327 Mich. 660, 42 N.W.2d 777 (1950); *State ex rel. Sullivan v. Cross*, 314 S.W.2d 889 (Mo. 1958); *Brooks v. National Bank*, 251 F.2d 37 (8th Cir. 1958), reversing 152 F. Supp. 36 (W.D. Mo. 1957); *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876 (1950); *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964); *Colman v. Pitzer*, 160 F. Supp. 862 (W.D. Pa. 1958); *Tarczyński v. Chicago, M., St. P. & P.R.R.*, 261 Wis. 149, 52 N.W.2d 396 (1952); *Feinsinger v. Bard*, 195 F.2d 45 (7th Cir. 1952) (Wisconsin statute). *Contra*, *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947). *McDOWELL* 101 n.55 cites three cases as in accord with *Knoop*, but in none did the statute mention personal representatives.

⁶¹ IDAHO CODE ANN. § 5-514 (Supp. 1965); ILL. REV. STAT. ch. 110, § 17 (1965); KAN. GEN. STAT. ANN. § 60-308(b) (1964); ME. REV. STAT. ANN. tit. 14, § 704 (1965); MICH. STAT. ANN. § 27A.705 (1962) ("representative"); N.M. STAT. ANN. § 21-3-16 (Supp. 1965); OKLA. STAT. ANN. tit. 12, § 187 (Supp. 1965); ORE. REV. STAT. § 14.035 (1963); S.D. Sess. Laws 1965, ch. 163, § 2; WASH. REV. CODE ANN. § 4.28.185 (1962).

⁶² ARK. STAT. ANN. §§ 27-2501—27-2507 (Supp. 1965); LA. REV. STAT. ANN. §§ 13.3201, 13.3206 (Supp. 1965); MD. ANN. CODE art. 75, §§ 94, 96 (1965); N.Y. CIV. PRAC. LAW § 302(a); V.I. CODE ANN. tit. 5, §§ 4901, 4903 (Supp. 1965); VA. CODE ANN. §§ 8-81.1-2 (Supp. 1964). All these but New York's apply to "executor, administrator or other personal [in Louisiana, "legal"] representatives," the formula of the UNIFORM INTER-STATE PROCEDURE ACT, §§ 1.01, 1.03. TENN. CODE ANN. §§ 20-235, 20-236 (Supp. 1965), and WIS. STAT. ANN. § 262.05(11) (Supp. 1965) apply to the "personal representative" of a "decedent" or "deceased person." MONT. REV. CODES ANN. § 93-2701(4) (Supp. 1965) does not extend to representatives of decedents who acted in the state.

⁶³ For Pennsylvania, see note 56 *supra*. There is no adverse state court decision in Ohio, although one federal district court is hostile. See note 55 *supra*. With regard to New Jersey, Ehrenzweig has sold himself short. New Jersey's highest court, in two recent decisions he unaccountably relegates to a footnote dealing with automobile statutes, has held

say that two-thirds of the state legislatures, and the Congress to boot, have no sympathy for the immunity principle.

The courts have not always been receptive to statutory attempts to remove representative immunity. In 1920 the New York Court of Appeals emasculated a statute permitting foreign representatives to be sued;⁶⁴ in 1925 it held it unconstitutional.⁶⁵ Years have passed, but judicial hostility dies hard. In 1947 a federal court invalidated Iowa's motorist statute as applied to a foreign administrator;⁶⁶ in 1964 New Mexico's statute repealing immunity was apparently limited to suits concerning local assets;⁶⁷ in *Hayden* in 1964 the Illinois Appellate Court held that "personal representative" in the Illinois long-arm statute meant only "an agent, employee, or representative of a living person."⁶⁸

While the Illinois Appellate Court is to be commended for recognizing that legislatures, like Alice's ovoid friend, can use words to mean whatever they please, the court did not explain why it thought that, contrary to the usual meaning of the words, executors and administrators were not "personal representatives." No conceivable purpose would be served by subjecting a tortfeasor's "agent" or "employee" to juris-

that N.J. STAT. ANN. § 3A:12-7 (1953) allows suit against a foreign representative served and doing estate business in New Jersey, in cases where the deceased could have been sued there. *Jacobs v. Rothstein*, 23 N.J. 641, 130 A.2d 384 (1957); *Farone v. Habel*, 22 N.J. 66, 123 A.2d 506 (1956). Neither case concerned motorists; in neither had the representative consented; in the first the court did not rely on, and in the second it did not mention, the existence of assets in the state.

The situation in Kansas is obscure. *Dewey v. Barnhouse*, 75 Kan. 214, 88 Pac. 877 (1907), rejected the claim that KAN. GEN. STAT. ANN. § 59-1708 (1949) required assets in the state: "[O]rdinarily a nonresident may be sued whenever the service of a summons can be had upon him within the state The same rule applies to foreign executors and administrators." *Id.* at 216, 88 Pac. at 877. *But see* *National Bank v. Mitchell*, 154 Kan. 276, 118 P.2d 519 (1941), cited by *Ehrenzweig*. Refusing to allow revivor of an attachment proceeding against a foreign executor after removal of the property from Kansas, the court stressed the absence of assets and added that "the Oklahoma executor is a creature of Oklahoma law, exercising, under that law, no extraterritorial powers by virtue of his appointment." *Id.* at 281, 118 P.2d at 522. Yet *Dewey* was cited as supporting the decision, and there was no suggestion either that the cause of action had arisen in Kansas or that the executor had been served there. An analogy to nonresident-motorist cases was rejected because, unlike the motorist, "the Oklahoma executor did nothing which constituted voluntary submission to service." *Ibid.* Some of the language is hostile, but the decision can be easily distinguished should a case like *Dewey* arise again, for, as the court said, there was at the time of revivor no basis for jurisdiction even over the decedent.

⁶⁴ *Helme v. Buckelew*, 229 N.Y. 363, 128 N.E. 216 (1920).

⁶⁵ *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925).

⁶⁶ *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947).

⁶⁷ *State ex rel. Scott v. Zinn*, 74 N.M. 224, 392 P.2d 417 (1964).

⁶⁸ *Hayden v. Wheeler*, 51 Ill. App. 2d 396, 201 N.E.2d 242 (1964), *rev'd*, 33 Ill. 2d 110, 210 N.E.2d 495 (1965).

diction, for servants are not accountable for their masters' torts nor agents on their principals' contracts. The court did not leave the statute entirely meaningless, for there are "representatives" who can be sued for the acts of live principals—guardians, for example—and it seems clear the legislative purpose embraces them. But guardians are likely to enjoy the same common law immunity as do the representatives of the dead;⁶⁹ and the apparently universal term "personal representative" hardly suggests that the legislature meant to reach guardians only.⁷⁰

The Illinois statute makes perfect sense if given its natural reading: as one state's part in a more or less nationwide legislative assault on the immunity of the foreign executor or administrator. The early non-resident-motorist laws, designed to provide a convenient and appropriate forum for the accident victim, neglected to mention the foreign administrator; uniformly they were held not to remove his immunity.⁷¹ The outcry has been continuous: If it is fair to bring back a live driver, it is fair to bring back a dead one.⁷² More than half the legislatures have responded by amending their laws to apply to the "executor" or "administrator,"⁷³ and sometimes, in the alternative, to the "personal representative."⁷⁴ When Illinois extended the principle of the motorist statute to other transactions within the state, it took care to fill the gap. It might, as the Appellate Court argued, have explicitly named "executors" and "administrators," as several states with similar statutes have done.⁷⁵ For reasons understandable to anyone who has written about "executors and administrators," and perhaps to avoid the risk of *exclusio alteris* as well, the legislature chose instead the generic term "personal representative."

⁶⁹ See GOODRICH, *CONFLICT OF LAWS* 377 (4th ed. Scoles 1964).

⁷⁰ Such a distinction would make sense, however, because there is no distribution of assets in guardianship cases and thus no argument for a concurrence of claims. See text accompanying notes 140-46 *infra*.

⁷¹ *E.g.*, Gregory v. White, 151 F. Supp. 761 (W.D.S.C. 1957); Riggs v. Schneider's Ex'r, 279 Ky. 361, 130 S.W.2d 816 (1939); Harris v. Owens, 142 Ohio St. 379, 52 N.E.2d 522 (1943); cases cited note 72, *infra*. See Annot., 155 A.L.R. 333, 345 (1945).

⁷² At least three courts have urged that the statutes be extended to representatives. Berwisht v. Venick, 21 Conn. Supp. 490, 492, 157 A.2d 603, 604 (Super. Ct. 1959); Beck v. Lund's Fisheries, Inc., 53 Del. 45, 55, 164 A.2d 583, 588 (1960); State *ex rel.* Ledin v. Davison, 216 Wis. 216, 222, 256 N.W. 718, 720 (1934). And see, *e.g.*, Holt, *Extension of Non-Resident Motorist Statutes to Non-Resident Personal Representatives*, 101 U. PA. L. REV. 223 (1952); Note, *Service on Foreign Executors and Administrators Under Non-Resident Motorist Statutes*, 15 U. CHI. L. REV. 451, 454 (1948); Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647, 648 (1948); 28 CHI.-KENT L. REV. 347, 354 (1950).

⁷³ See note 59 *supra*.

⁷⁴ *E.g.*, FLA. STAT. ANN. § 47.29 (Supp. 1964); GA. CODE ANN. § 68-810 (1957).

⁷⁵ See note 62 *supra*.

The Supreme Court of Illinois reversed the Appellate Court's decision in *Hayden v. Wheeler*.⁷⁶ This reversal was right, and it is important because of its persuasive value for overcoming judicial antagonism in the nine states with statutes identical with Illinois.⁷⁷ With increasing acceptance of the long-arm statutes, and with the more favorable judicial attitudes displayed by the Illinois Supreme Court and by many others in automobile cases, the representative's immunity seems to be on its hasty way out.

The Price of Immunity

The foreign administrator's immunity from suit is waning, but it is not too late to argue for its restoration, or, as the case may be, to give it a good swift kick toward oblivion. The disadvantage of the immunity rule is plain enough: it denies the plaintiff an otherwise appropriate forum. *Hayden v. Wheeler*, for example, concerned an Illinois automobile accident. If the foreign driver had survived that accident, Illinois would unquestionably have had jurisdiction over him. Ever since 1929 the Illinois legislature has recognized that it is fair to summon nonresident motorists to Illinois courts in actions arising from their Illinois accidents;⁷⁸ in 1955 it extended this principle, subjecting nonresidents to jurisdiction in cases concerning "the commission of a tortious act within this State."⁷⁹ The opinions in *Hayden* do not reveal the residence of the plaintiff or of the witnesses; but the likelihood of substantial convenience has led both Illinois and Wisconsin, as well as the federal Congress, to approve the place of the accident as a proper venue in automobile cases.⁸⁰ Moreover, even if both parties were nonresidents, Illinois law would certainly determine at least the standard of conduct, and the awarding of damages to the injured party might well further Illinois' legitimate interests. Finally, the driver's voluntary incursion into Illinois destroys any argument of unfair surprise. Had the driver survived, jurisdiction would have been plain. Why, then, should the driver's death make a difference?

⁷⁶ 33 Ill. 2d 110, 210 N.E.2d 495 (1965).

⁷⁷ See note 61 *supra*. South Dakota's statute defines "person" subjected to jurisdiction by local conduct to include "an individual's agent or personal representative." This is an invitation to a construction like that of the lower court in *Hayden*, the more so since the same statute confers jurisdiction over a person who acts as "executor or administrator" in the state. But if "personal representative" means "agent" it is superfluous, and jurisdiction over an agent is still nonsense.

⁷⁸ ILL. REV. STAT. ch. 95½, § 9-301 (1965).

⁷⁹ ILL. REV. STAT. ch. 110, § 17 (1965).

⁸⁰ ILL. REV. STAT. ch. 110, § 5 (1965); WIS. STAT. § 261.01(11) (1955); 28 U.S.C. § 1391(f) (1964).

The Traditional Reasons for Immunity

I think there is a serious argument for an administrator's immunity from suit, but it is difficult to pin down and to evaluate. Unfortunately the defenses most commonly encountered are either transparently faulty or maddeningly vague. Let us begin at the bottom of the barrel.

First. The most simplistic explanation of immunity is that, in his fiduciary capacity, the representative does not exist,⁸¹ or has no authority,⁸² outside the state of appointment. This is not a reason but a restatement of the conclusion; for one's representative capacity, unlike a jellyfish or a widget, exists wherever the law says it does. The question remains, why does the law limit this existence to one state?

The same theory once interfered with jurisdiction over corporations: "foreign corporations have their legal existence, and are located within the territory, the state or government that creates them; and can, in no legal sense, be said to be within this state."⁸³ But as applied to corporations this theory was relegated to the archaeologists a hundred years ago. Even while affirming that a corporation existed only in Georgia, Mr. Chief Justice Taney upheld its right to contract and to sue in Alabama,⁸⁴ and it was not long before the courts began to say that foreign corporations existed after all. At that point their immunity disappeared: because a foreign corporation was allowed to sue "it would seem consistent with sound principle that it should also be liable to be sued"⁸⁵ The existence of an artificial person outside the state creating it is neither logically impossible nor without precedent.

Moreover, respecting foreign personal representatives the nonexistence theory is an inaccurate description of the law. The foreign representative is often permitted to collect debts, to gather assets, to assign choses in action, to exercise a testamentary power to sell land, and even to bring lawsuits.⁸⁶ If he cannot also be sued, it is not because he doesn't exist.

Second. One of the more seductive arguments against suing foreign administrators derives from the theory that probate and administration proceedings are in rem:

⁸¹ *E.g.*, *McMaster v. Gould*, 240 N.Y. 379, 385, 148 N.E. 556, 558 (1925); *Knoop v. Anderson*, 71 F. Supp. 832, 845 (N.D. Iowa 1947).

⁸² *E.g.*, *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1, 5 (1841).

⁸³ *Kane v. Morris Canal & Banking Co.*, opinion set forth at 14 Conn. 303 n.(a) (N.Y. Sup. Ct. 1840), quoted in HENDERSON, *THE POSITION OF FOREIGN CORPORATION IN AMERICAN CONSTITUTIONAL LAW* 79 (1918).

⁸⁴ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588, 592 (1839).

⁸⁵ *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N.J.L. 57, 60 (Sup. Ct. 1855).

⁸⁶ See McDOWELL 63-65, 68, 125, 144.

[O]ne qualifying as an executor or an administrator does not thereby become personally liable for claims owing by the decedent at the time of his death. . . . A proceeding for the establishment of a claim against an executor of an estate in his representative capacity is in the nature of a proceeding in rem. . . . Jurisdiction to render a judgment in rem is primarily founded upon the presence of property in the state Thus . . . the jurisdiction of the courts of each state in regard to claims owing by a decedent is limited to the property of the decedent in the particular state.⁸⁷

"[T]itle [to foreign property] cannot de jure extend, as a matter of right, beyond the territory of the government which grants it."⁸⁸ As a result of this reasoning there is no jurisdiction over the administrator because he is not personally liable and no jurisdiction over his property because he has no property in the state.⁸⁹

If we must pigeon-hole, I would not call an action for personal injury damages "in rem,"⁹⁰ although the result of the proceeding is to establish a claim to property, and analogous damage suits by foreign attachment are referred to as "quasi in rem." But the day is past when inquiry could be foreclosed by invocation of the magic "in rem" label. It is not sufficient to argue that jurisdiction must fail because a state has no power over foreign property; in a federal system with a full faith and credit provision, one state's power over property in another is what the Supreme Court says it is. Jurisdiction over corporations and other persons depends upon a substantial connection between the state and their acts or promises giving rise to the claim and upon the notion of fair play.⁹¹ Jurisdiction over property, which similarly determines the rights of persons, should depend upon similar considerations.⁹² The

⁸⁷ Knoop v. Anderson, 71 F. Supp. 832, 840-41 (N.D. Iowa 1947).

⁸⁸ STORY, CONFLICT OF LAWS § 512 (8th ed. 1883).

⁸⁹ An alternative version of the in rem thesis could, however, be premised on the administrator's title extending to all property of the deceased, wherever situated. See, e.g., Wilkins v. Ellet, 108 U.S. 256, 258-59 (1883); Peterson v. Chemical Bank, 32 N.Y. 21, 43, 45 (1865). This would not be inconsistent with the in rem argument, but would only allow the foreign representative to be made a party to suits against property in the forum state.

⁹⁰ Neither would the Supreme Court: "[A]n order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution . . . it deals directly with the property. In so far as it determines . . . the existence and amount of the indebtedness . . . , it . . . is strictly a proceeding *in personam*." Riehle v. Margolies, 279 U.S. 218, 224 (1929). See also Morris v. Jones, 329 U.S. 545, 549 (1947); Note, *supra* note 72, 57 YALE L.J. at 653.

⁹¹ McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); see D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 536, 541.

⁹² See Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909,

California Supreme Court has determined its jurisdiction in an action it considered "in rem" on the basis of fairness to the parties;⁹³ the United States Supreme Court, deeming it irrelevant whether the proceeding was in rem or in personam, has determined jurisdiction to settle a trustee's accounts by looking to the interest of the forum.⁹⁴ If Illinois' interest in providing a forum for trial convenience and the effectuation of its laws is to be defeated in *Hayden v. Wheeler*, it can only be because the driver's death or the appointment of a Wisconsin administrator creates or enhances some interest that makes trial in Illinois fundamentally unfair. The fact that the administrator will not be personally liable, stressed in the in rem approach, certainly does not make it so.

Third. It has been said that the foreign representative's immunity from suit is a corollary to his incapacity to bring suit.⁹⁵ It is not a logically inescapable corollary, nor does it explain the existence of immunity in states such as Illinois that permit foreign representatives to sue.⁹⁶ Some of the reasons given for incapacity also support immunity; but while the major purpose of the rule barring suits by foreign fiduciaries is the protection of local creditors,⁹⁷ the immunity rule works to those creditors' disadvantage. If it was thought that immunity must be granted in order to conceal the selfish purpose of the rule forbidding foreign representatives to sue, it is high time the thought was abandoned. Moreover, the incapacity rule itself has nothing to recommend it, and two wrong rules are not better than one.

Fourth. Beale tells us that the really important reason for refusing to permit suits against a foreign representative is that to allow suit would amount to "forcing him against his will to pay another man's debts"⁹⁸—which, if true, is as arbitrary as he says. But the assertion is contrary to the facts. Nobody argues that the administrator should be required to pay the foreign judgment out of his own pocket; it must be satisfied out of assets belonging to the estate. He is no more required to pay another man's debt by a foreign judgment than by a domestic

956 (1960); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUPREME COURT REV. 241, 266-67. "The property . . . no longer has significance as a 'thing' over which the court has jurisdiction, but is merely an event that is the proper occasion for exercise of local jurisdiction, like an automobile accident . . ." *Id.* at 277.

93 *Atkinson v. Superior Court*, 49 Cal. 2d 338, 346-48, 316 P.2d 960, 966 (1957).

94 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950). *But see* *Hanson v. Denckla*, 357 U.S. 235 (1958), discussing separately jurisdiction in rem and in personam. This is but one of the many unfortunate aspects of *Hanson v. Denckla*.

95 See 1955 U. ILL. L.F. 764, 766; 28 CHI.-KENT L. REV. 347, 352 (1950).

96 ILL. REV. STAT. ch. 3, § 265 (1965).

97 See text accompanying note 17 *supra*.

98 3 BEALE, CONFLICT OF LAWS 1553 (1935).

one, and no one doubts that he can be pursued for the same debt by proceedings in the appointing state.

Fifth. The administrator, unlike the decedent, may have had no contacts with the forum state. Does this make it unfair to sue him there? Quite possibly his acceptance of the job with reason to know of the dead man's foreign connections satisfies the essential requirement of *Hanson v. Denckla*⁹⁹ that there be no unfair surprise. More important, the representative is a disinterested stakeholder. He pays the claim with the estate's money, he is reimbursed for his expenses, he hires a foreign lawyer and need not appear in the action. He has nothing to lose by being named as defendant, and it is not unfair to sue him wherever the decedent could have been sued.¹⁰⁰

Sixth. It is sometimes argued that a foreign representative cannot be sued because of "the impossibility of enforcing a judgment"¹⁰¹ against him. Why is the judgment unenforceable? Because the court had no jurisdiction over the foreign administrator.¹⁰² This is thinking in circles. The court lacks jurisdiction because the judgment is unenforceable; the judgment is unenforceable because the court lacks jurisdiction. We are back where we began.

The argument can be made more persuasive. It seems clear that, unless there is a lack of jurisdiction, a judgment against a foreign representative is entitled to full faith and credit. *Morris v. Jones* establishes that suits to establish claims provable against an estate are judicial proceedings within the meaning of the Constitution,¹⁰³ and exceptions

⁹⁹ 357 U.S. 235 (1958).

¹⁰⁰ Although *Hanson* held Florida's assertion of jurisdiction over a Delaware trustee unconstitutional over a dissent arguing that the trustee had no interest in the outcome, the decision need not be read either as holding it unfair to summon a defendant who has nothing to lose, or as finding an adverse effect without satisfactory evidence. The Court did not advert to the issue; the former suggestion is too improbable to be inferred, and the report permits conflicting inferences as to the latter. See D. Currie, *supra* note 91, at 548 & n.106. For the view that the defendant need not always have contacts with the forum state, see *Williams v. North Carolina (I)*, 317 U.S. 287 (1942), a decision that can be justified if one believes that a wife whose husband is not living with her and whose rights to child custody and property are protected loses nothing by a formal divorce. *But see*, on this latter point, *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965).

¹⁰¹ 3 BEALE, CONFLICT OF LAWS 1553 (1935). See also McDOWELL 84-86, 103-04.

¹⁰² 3 BEALE, CONFLICT OF LAWS 1553 (1935). See also McDOWELL 85, 104.

¹⁰³ 329 U.S. 545 (1947). The estate was that of an insolvent foreign insurance association, and suit had been instituted against the association prior to the appointment of the domiciliary liquidator. These differences are insignificant. The cases do not distinguish revivor from original actions. See RESTATEMENT, CONFLICT OF LAWS § 512, comment b (1934). And the Supreme Court has lumped decedents' and insolvents' estates together for purposes of recognition of judgments. See *Riehle v. Margolies*, 279 U.S. 218, 225-26 (1929), also suggesting in dictum that state courts must respect federal judgments against decedents' administrators. The homily that a judgment against an administrator is not

to the command of respect for every valid judgment have rarely, if ever, been made "in cases involving money judgments rendered in civil suits."¹⁰⁴ If exceptions of any kind remain, they are based upon an unusually potent interest of the state to which the foreign judgment is taken for enforcement, such as its interest in custody of its children.¹⁰⁵ Whether there is any such interest in the localization of suits against administrators is the question we are now exploring, but the Supreme Court in *Morris v. Jones* has strongly suggested that there is not.¹⁰⁶

Yet the conclusion that full faith is owing to judgments against foreign administrators does not make it certain that they will be enforced. It is by no means clear, for example, that the appointing state must recognize a foreign judgment presented after the time prescribed for filing claims against the estate;¹⁰⁷ such requirements serve the respectable administrative purpose of facilitating distribution, and the Supreme Court has allowed a state to apply its statute of limitation to a suit on a foreign judgment.¹⁰⁸ Moreover, what is to be done if the estate is closed before the foreign suit comes to judgment? Pending proceedings elsewhere no more forbid discharge of the administrator, as a matter of constitutional law, than they forbid any other race to judgment; and an injunction restraining the representative from seeking

really a judgment, *Leighton v. Roper*, 300 N.Y. 434, 443, 91 N.E.2d 876, 881 (1950), is only an inapt way of saying that it cannot be enforced by execution. This does not make it any the less the outcome of a "judicial proceeding," and there is no reason why a foreign judgment against an administrator cannot be proved and satisfied in probate the same way as a local or a federal one.

¹⁰⁴ *Morris v. Jones*, 329 U.S. 545, 553 (1947), citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943), where the point was made still more forcefully: "We are aware of no such exception in the case of a money judgment rendered in a civil suit."

¹⁰⁵ See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 440-41 (1943); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 273 (1935); *Yarborough v. Yarborough*, 290 U.S. 202, 215 (1933) (Stone, J., dissenting); Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 163 (1949).

¹⁰⁶ "One line of cases holds that where a statutory liquidator or receiver is appointed, the court taking jurisdiction of the property draws unto itself exclusive control over the proof of all claims. But the notion that such control over the proof of claims is necessary for the protection of the exclusive jurisdiction of the court over the property is a mistaken one." 329 U.S. at 549. *Morris* does not, however, squarely hold that a foreign court had jurisdiction over a claim against the liquidated corporation, because the Court held respondent could not raise collaterally the question of full faith and credit to the decree appointing the liquidator. *Id.* at 552.

¹⁰⁷ *E.g.*, ILL. REV. STAT. ch. 3, § 204 (1965): "claims against the estate of a decedent . . . not filed within 9 months from the issuance of letters . . . are barred . . ."

¹⁰⁸ *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839). See B. Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 268, 277-78 (1959), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 283, 335 (1963).

a discharge would be highly unusual, likely undesirable,¹⁰⁹ and of doubtful enforceability.¹¹⁰ Even if the discharge itself is not entitled to full faith and credit as an adjudication of nonliability,¹¹¹ it might seem to be stretching things a bit to hold that the Constitution requires tracing the assets into the hands of distributees.

So the appointing court often may after all be free to refuse enforcement of a foreign judgment against its administrator. But this need not require an immunity from foreign suit. The fact that a penal judgment, for example, is thought to be unenforceable in other states does not deprive a court of jurisdiction to render it. If the plaintiff is willing to take the risk of nonenforceability, should he not be allowed to? It is not as if the judgment were certain to be worthless. In automobile cases, at least, where insurance is likely, enforcement in the appointing state may be unnecessary since the insurance will pay.¹¹² Moreover, the risk is mitigated by state statutes forbidding final distribution until all claims are settled,¹¹³ or permitting proceedings against distributees after the estate is closed.¹¹⁴ It is mitigated further by the argument that, absent unusual delay or harassment, comity may counsel withholding from distribution money enough to satisfy the potential judgment.

Seventh. A few courts have held attempts to assert jurisdiction over foreign representatives unconstitutional under the due process clause.¹¹⁵ But constitutional arguments have consistently failed in the state and lower federal courts since 1947.¹¹⁶ The long-arm principle has the Supreme Court's firm approval,¹¹⁷ the Court has gone out of its way to suggest that jurisdiction over a foreign corporate successor is constitutional,¹¹⁸ and the policy of unified administration, as will be shown

¹⁰⁹ See p. 457 *infra*; *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

¹¹⁰ See *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858 (1958).

¹¹¹ It may not be so intended. But many creditors may be subject to process in the appointing state; the filing of a claim before the expiration of the limitation period may well be held a submission to jurisdiction; and traditional theory would sustain jurisdiction to cut off claims to property in the appointing state.

¹¹² See *Leighton v. Roper*, 300 N.Y. 434, 443-44, 91 N.E.2d 876, 881 (1950).

¹¹³ *E.g.*, CAL. PROB. CODE §§ 1000, 1020.

¹¹⁴ *E.g.*, WIS. STAT. § 313.25 (1955).

¹¹⁵ *E.g.*, *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925).

¹¹⁶ See note 60 *supra*.

¹¹⁷ See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

¹¹⁸ *Morris v. Jones*, 329 U.S. 545, 548-50 (1947), perhaps holding only that objections to jurisdiction over a foreign corporate successor must be made at trial, not collaterally. See also *Iovino v. Waterson*, 274 F.2d 41, 45 (2d Cir. 1959), holding there is no constitutional objection to revivor against foreign representatives in federal courts and doubting, on the basis of *Morris*, the existence of such an objection in state courts. Moreover, jurisdiction over foreign representatives is supported by the policy in favor of transitory actions that

below, does not make an otherwise appropriate forum fundamentally unfair.

The Interest in Unified Administration

The most serious argument is that the foreign representative must be protected from being sued for the same reason he must be permitted to sue: in order to promote the efficient and equitable administration of estates.¹¹⁹ The advantages of litigating all claims in a single proceeding, it is argued, justify depriving the plaintiff of his choice of an otherwise desirable forum. This policy finds expression not only in decedents' estate matters, but also in two analogous areas in which multiple claimants must be paid from a limited fund. When a bankruptcy petition is filed, actions against the debtor are stayed until the issue of bankruptcy is determined, and may be stayed further until discharge.¹²⁰ When a shipowner petitions to limit his liability to the value of his vessel, "all claims and proceedings against the owner with respect to the matter in question shall cease."¹²¹ Both in bankruptcy and in limitation, creditors who have properly brought suit in California and in Georgia may be forced to litigate their claims wherever the petition has been filed—and that may be in New York.¹²²

1. What Disadvantages Are Avoided by Having All Claims Litigated in a Single Proceeding?

A. In limitation proceedings, it is arguable that consolidation of claims is desirable as a means of protecting the owner against having to pay more than the statutory ceiling.¹²³ In decedents' estate cases there is no such danger, since the representative is not personally liable.

the Supreme Court has found in the full faith and credit clause. *Hughes v. Fetter*, 341 U.S. 609 (1951); *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914). See Comment, *The Amenability to Suit of Foreign Executors and Administrators*, 56 COLUM. L. REV. 915, 934 (1956). Also, though the appointing state may not have given the administrator authority to be sued elsewhere, another state may have an interest in providing a forum, and most recent decisions permit any interested state to apply its own law. See, e.g., *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Clay v. Sun Ins. Office*, 377 U.S. 179 (1964); *Richards v. United States*, 369 U.S. 1 (1962) (dictum). If exceptions remain, it is because of a conflicting interest entitled to greater respect under the Constitution. See *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947). The only contrary interest here is that in consolidation of claims, which will be considered next.

¹¹⁹ See, e.g., *McDOWELL* 86, 121.

¹²⁰ 52 Stat. 849 (1938), as amended, 66 Stat. 422 (1952), 11 U.S.C. § 29 (1964).

¹²¹ 49 Stat. 1480 (1936), 46 U.S.C. § 185 (1964).

¹²² If the shipowner has been sued in more than one district, he may file in any of them; if he files before he is sued, he may do so wherever the vessel may be. *FED. ADM. R.* 54. See *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883), requiring a Massachusetts suitor to file its claim in New York.

¹²³ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 153 (1957).

B. Whenever total claims exceed the available funds, as always in bankruptcy and limitation and often enough in probate, something must be done to assure proration or recognition of priorities, so that each creditor gets his fair share. To permit suit against a foreign representative, McDowell argues, offends this principle because it "tends to give the plaintiff a preference over other creditors of the decedent."¹²⁴

This is a persuasive argument against permitting satisfaction of a judgment against the administrator by execution or securing payment by attachment,¹²⁵ but it does not justify prohibiting a suit to establish the validity of a claim. Equitable distribution of inadequate assets can be assured by requiring the creditor to present his judgment as a claim in the administering court.¹²⁶ If the actions concern the right to particular assets, the fear of preferences is again misplaced, for the plaintiff claims not a slice of the common pie but that part of it which is not common at all; if he proved that in the administering court, he would not be asked to share his property with the creditors of the estate.

C. The *Restatement* objects to suits against foreign administrators because "to order payment" from assets in the representative's hands would constitute "interference with the administration by the [appointing] court"¹²⁷ With respect to actions for money, this again misconceives the nature of a judgment against an administrator. All the administering court need do is admit the judgment as satisfactory proof of the claim; recognizing a judgment against the representative is no more interference than recognizing a judgment against the deceased, and that is common practice.¹²⁸ A foreign judgment respecting a specific asset is a horse of another color. Even outside the estate field, the desire to avoid interference gives rise to the doctrine that the jurisdiction of a court to dispose of property in its custody is exclusive.¹²⁹

¹²⁴ McDOWELL 121-22.

¹²⁵ Kansas decisions allow attachment of estate property in suits against foreign representatives. *E.g.*, *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550 (1904).

¹²⁶ In limitation proceedings the Fifth Circuit has refused to permit litigation elsewhere of claims for satisfaction from the fund, because to do so would leave "little, if anything" of the statutory scheme, and because issues of negligence once tried might have to be reexamined in the second suit on the issue of the owner's "privity and knowledge." *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960). No such problems exist in estate cases, and the Supreme Court has permitted litigation of claims against decedents in the federal courts, although they are to be satisfied in the appointing court. *E.g.*, *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276 (1874).

¹²⁷ RESTATEMENT, CONFLICT OF LAWS § 512, comment a (1934).

¹²⁸ See *Riehle v. Margolies*, 279 U.S. 218, 223-26 (1929); *Morris v. Jones*, 329 U.S. 545, 548-50 (1947).

¹²⁹ See, *e.g.*, *Byers v. McAuley*, 149 U.S. 608, 614 (1893), and cases cited. Compare the

Whether custody of property should determine the forum, however, may be doubted, and the rule of exclusive in rem jurisdiction may come to be modified, as less importance is attached to the "in rem" label. The most the *Restatement's* argument can prove is that suit should not be allowed to determine the right to specific assets administered elsewhere; even in such a case I am not certain that such jealousies of jurisdiction without more should defeat the substantial interest of another state in providing a forum.

D. McDowell expresses concern lest foreign suits subject the representative to conflicting orders by various courts as to the disposition of assets.¹³⁰ This, too, applies only in an action to recover specific property, and even then there is no problem unless two or more people claim the same asset. Then, it may be argued, if absent claimants are not bound by the judgment, the representative may be surcharged in a second action; if they are bound because the representative is a fiduciary acting for all interested parties, their claims are extinguished without the opportunity to litigate in a convenient forum. But, if the representative cannot be trusted to speak for the others, this is a classic case for interpleader.¹³¹ A living stakeholder can bring in rival claimants, even if beyond the normal reach of process, in order to protect himself.¹³² His successor can be protected by the same device, without forbidding suit in a forum convenient to the plaintiff, for the death of the possessor makes the forum no less fair to competing claimants.

E. Unitary administration avoids multiple litigation arising out of a single set of facts, which may waste time and money. This has been held to justify a stay of outside suits in bankruptcy.¹³³ But it would not

professed readiness of the federal courts to enjoin competing state proceedings when federal jurisdiction is "in rem," with their reluctance to do so when federal jurisdiction is "in personam." *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922). See Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 472 n.9, 493-94 (1965).

¹³⁰ McDOWELL 86: "The representative would be placed in an impossible position of trying to decide which court to obey." See also *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 595 (1883), fearing "contrary results" unless all claims against a shipowner were brought into the limitation proceeding.

¹³¹ See Comment, *supra* note 118, 56 COLUM. L. REV. at 928.

¹³² This is clearly true in the federal courts, 28 U.S.C. § 1335 (1964), and probably also in the state courts, *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957); see B. Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 772-77 (1961), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 683-88 (1963), despite the not-yet-overruled case of *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), which may be based on Pennsylvania law instead of the federal constitution.

¹³³ *In re People's Warehouse Co.*, 273 Fed. 611 (S.D. Miss. 1921), involving 108 claims for flood damage to cotton in a single warehouse. Even in such obvious cases of overlapping proof it is arguable that consolidation can be carried too far. See Kitch, § 1404(a) of the *Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 109 (1965).

require consolidation of suits against a living, solvent debtor,¹³⁴ and duplication of proof is no more likely when the debtor is dead. Even if a single proceeding is desirable, the court of administration is not necessarily the best place for it, and the problem seems better handled by discretionary dismissal in appropriate cases. In any event, the decedent's grocer and his accident victim are not likely to present overlapping evidence. The danger of duplicate proof cannot justify a blanket rule requiring dismissal of suits on unrelated claims.

On behalf of unitary administration it can still be argued that even if all claims are unrelated, separate trials in various states may be more costly to the estate than a single proceeding. But the decedent, or the bankrupt, would have had to bear these costs; should those claiming under him be better treated? There is something to be said for consolidation if it will maximize the size of the pie, but this requires proof that a centralized proceeding saves the estate more money than it costs all the creditors, and this would seem to vary with the facts of the case.

The necessity for litigating in several states at once would not be unduly burdensome for an administrator. He does not bear the costs of suit, and he is paid for his trouble. Besides, as administrator he is neither lawyer nor witness; there is no need for him to appear in court, and he need not overly trouble himself with foreign litigation.

Bankruptcy cases illustrate another point that relates to all issues of delay, costs, and inconvenience. The immunity rule is often held to apply when the defendant dies during the proceedings,¹³⁵ as well as when the suit is filed against the representative initially. But to stop a trial in the middle, or even after verdict or on appeal, is to waste time, money, and effort, not to save them.¹³⁶

F. Since a foreign judgment against an administrator should not be collected by execution, the creditor must appear in the appointing court to prove his judgment. Might he not just as well establish his claim in the administering court in the first place, and eliminate the necessity for double court costs and delays? This argument cuts too broadly.

¹³⁴ Nor, without more, of suits against a shipowner. If total claims are less than the value of the vessel, "there can be no reason why a shipowner . . . should be treated any more favorably than an airline, bus, or railroad company." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 153 (1957).

¹³⁵ *E.g.*, *McMaster v. Gould*, 239 N.Y. 606, 147 N.E. 214 (1925). See *RESTATEMENT, CONFLICT OF LAWS* § 512, comment b (1934).

¹³⁶ *In re Gerstenzang*, 52 F.2d 863 (S.D.N.Y. 1931); *In re Seattle No. Pac. Shipbuilding Co.*, 296 Fed. 925 (W.D. Wash. 1924). The bankruptcy court has discretion to permit actions elsewhere to determine the validity and extent of claims. See 1 *COLLIER, BANKRUPTCY* 1149-50 (14th ed. 1964).

Jurisdiction over a living, solvent debtor does not depend upon the presence in the forum state of property against which the judgment can be executed; simply because the debtor is dead the claimant should not have to bring his suit elsewhere. Moreover, presenting the judgment for collection in the estate proceedings is a matter of filing a paper or two; having the trial at his chosen forum saves the plaintiff the trouble of transporting himself and his witnesses to another state, and preserves his choice-of-law advantage.

G. The appointing court has no control over the progress of foreign dockets. To wait for the conclusion of foreign actions may delay distribution of the estate. To distribute it without waiting either makes the foreign judgment uncollectible (absent insurance) or requires tracing the assets into the hands of heirs and creditors. All three choices are undesirable, and all would be avoided by requiring all claims to be litigated in a single court.

This is a serious point. The delay may be substantial: waiting for completion of a Chicago automobile suit may hold up administration in rural Kansas for several years. Moreover, an argument that those claiming from an estate are entitled to no better treatment than the deceased misses the point, for a delay in distribution, unlike a pending action against a living and solvent defendant, effectively ties up the assets. I have minimized the argument that judgments against foreign administrators are unenforceable by stressing that many will be respected; it would hardly be consistent now to say that delay is unlikely because the foreign judgment need not be enforced.

It is true that delay is less likely if the defendant died after suit was filed; that it may be the automobile action that is filed in rapid Kansas and the administration in Chicago; that distribution permits investment of assets even if distributees may later be sued on a late foreign judgment; that there may be equal delay awaiting the outcome of suits against the administrator in federal or state courts in the state of appointment.¹³⁷ Possible delay, like cost, varies from case to case. Like cost, it may properly be taken into account in a discretionary determination of whether to take jurisdiction over a foreign administrator, and it may be relevant to whether distribution should be made before the entry of a foreign judgment. But delay and cost are no more than factors to be weighed against the interests of the forum state in the plaintiff's and witnesses' convenience and the application of its own law. They do not seem to me to justify a general immunity rule.

¹³⁷ See text accompanying notes 138-46 *infra*.

2. *The Likelihood of Unified Administration*

In assessing all arguments about the virtues of consolidating claims in the appointing court, it is important to bear in mind that forbidding actions in other states will not necessarily assure litigation in a single court. In the first place, the federal courts from time immemorial have entertained actions against personal representatives.¹³⁸ This is as disruptive of a unified claims procedure as is suit in the court of another state,¹³⁹ yet federal jurisdiction is thought to be justified by the policy of providing an impartial forum for the protection of out-of-state parties or the effectuation of federal concerns. The policy of providing a convenient, interested forum in a state with which the decedent has significant contacts seems no less compelling a reason for allowing suits outside the appointing courts. The supremacy clause of course provides a quick explanation of suits in federal courts; but in determining the existence of diversity jurisdiction the courts have not hesitated to subordinate the federal policy of providing an impartial forum when confronted with a state interest thought to be of some magnitude, such as the desire for administrative expertise in workmen's compensation cases or the highly sensitive and discretion-riddled enforcement of child custody or divorce laws.¹⁴⁰

Still more persuasive, perhaps, is the fact that a number of states permit actions to be filed against local representatives in courts other than that of appointment. In Wisconsin, for example, a concurrence of claims in a single court is impossible, for tort claims may not be filed in probate or administration proceedings.¹⁴¹ The circuit courts, which have no probate jurisdiction,¹⁴² have consistently entertained tort actions against personal representatives in accordance with the "long-continued practice of the profession."¹⁴³ Further, there seems to be no

¹³⁸ *E.g.*, *Markham v. Allen*, 326 U.S. 490 (1946) (suit for legatees' share), and cases cited; *Hess v. Reynolds*, 113 U.S. 73 (1885) (suit by creditor of decedent). But the federal court will not administer or dispose of the assets themselves. *Markham v. Allen*, *supra* at 494 (dictum); *Byers v. McAuley*, 149 U.S. 608 (1893).

¹³⁹ Except that the federal court is likely to be closer to the appointing court than are the courts of other states.

¹⁴⁰ See *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859) (dictum); *WRIGHT, FEDERAL COURTS* 72-74 (1963).

¹⁴¹ See *Monart Motors Co. v. Home Indem. Co.*, 1 Wis. 2d 601, 605, 85 N.W.2d 478, 481, (1957) (dictum); *Karlen, Constitutional and Statutory Courts*, 1949 WIS. L. REV. 706, 708-09. Contract claims, on the other hand, must be filed in the estate proceeding; most actions against administrators are forbidden. WIS. STAT. ANN. § 287.17 (Supp. 1965), § 287.01 (1958); *Lannon v. Hackett*, 49 Wis. 261, 5 N.W. 474 (1880).

¹⁴² WIS. STAT. ANN. § 313.22 (1958).

¹⁴³ *Payne v. Meisser*, 176 Wis. 432, 441, 187 N.W. 194, 198 (1922). See also *Lounsbury v. Eberlein*, 2 Wis. 2d 112, 86 N.W.2d 12 (1957); *School District v. Brennan*, 236 Wis. 91, 294 N.W. 558 (1940).

special venue provision applicable to suits against representatives, and the general venue statute permits automobile cases to be brought where the cause of action arose or where the defendant resides.¹⁴⁴ California, on the other hand, by limiting venue in most actions against administrators to the county of appointment,¹⁴⁵ has consciously subordinated the convenient forum to a policy of unitary administration, and this interest may legitimately be taken into the balance in deciding whether to subject a California appointee to suit in another state. But courts really ought to stop dismissing suits against foreign representatives in cases like *Hayden v. Wheeler*. The Illinois Appellate Court by declining jurisdiction served no Wisconsin policy of consolidating claims in the Dane County probate court, for the tort action could not have been tried in that court under Wisconsin law.¹⁴⁶

Further, many courts have long recognized exceptions to the immunity rule, which indicate the low priority given to unitary administration when it is important to provide a convenient forum. The *Restatement* approves two exceptions: a foreign representative may be sued on obligations he has incurred, or for torts he has committed, in the course of administration; and he may be sued to recover assets he has wrongfully brought into the forum state or is wasting or converting there.¹⁴⁷ Both exceptions are widely accepted; both can superficially be squared with traditional theory. In both cases, it is said, the representative is sued in his individual, not his official capacity, because he is

¹⁴⁴ WIS. STAT. ANN. § 261.01(11) (1958).

¹⁴⁵ CAL. CODE CIV. PROC. § 395.1, held applicable to tort cases in *Jones v. McGinnis*, 121 Cal. App. 2d 720, 263 P.2d 907 (1953). Early cases had held actions against administrators could be filed in other counties. *E.g.*, *Chiapella v. County Nat'l Bank & Trust Co.*, 217 Cal. 503, 19 P.2d 983 (1933).

¹⁴⁶ Wisconsin's law has been criticized, see Karlen, *supra* note 141, at 708-09, but Wisconsin is not alone in permitting actions against representatives outside the appointing court. *E.g.*, *Baker v. Puckett*, 182 Ark. 265, 31 S.W.2d 286 (1930); *Long v. Stanford*, 135 Ga. 823, 70 S.E. 465 (1911); *Snively v. Wilkinson*, 138 Ohio St. 125, 33 N.E.2d 999 (1941); *Sherrill v. Stevenson*, 174 Tenn. 672, 130 S.W.2d 110 (1939); *Steinbach v. Hearne*, 278 S.W.2d 285 (Tex. Civ. App. 1953). See Annot., 93 A.L.R.2d 1199 (1964).

In Illinois, the new judicial article of the constitution and its implementing legislation abolished the old probate courts and for the first time authorized tort claims to be filed in administration or probate proceedings. ILL. CONST. art. 6, § 8; ILL. ANN. STAT. ch. 3, § 192 (Smith-Hurd Supp. 1965). This, together with the statute barring claims not filed within nine months, ILL. REV. STAT. ch. 3, § 204 (1965), *Snydacker v. Swan Land & Cattle Co.*, 154 Ill. 220, 40 N.E. 466 (1895), may succeed in localizing claims in the administering court. On the other hand, *People's Bank v. Wood*, 193 Ill. App. 442 (1914), permitted suit in McLean County against a Cook County executor on a contract claim subject to the then two-year nonclaim statute. The present venue statute, ILL. REV. STAT. ch. 110, § 5 (1965), like that in force in 1914, allows suit at the defendant's residence or where the action arose, and there is no special provision for suits against representatives.

¹⁴⁷ RESTATEMENT, CONFLICT OF LAWS §§ 515-16 (1934).

personally liable both for his acts on behalf of the estate¹⁴⁸ and for his trespasses against it.¹⁴⁹ The latter case, moreover, concerns assets in the forum state and therefore can be explained as an exercise of jurisdiction in rem.¹⁵⁰

But this is labeling, not reasoning. The cases we are considering, unlike an action for the price of the administrator's personal ping-pong table, can interfere with orderly, unified administration quite as much as the ordinary suit for a claim against the decedent. The administrator is required to litigate in more than one place at once, and his personal liability assures that he will be attentive enough to find this a burden. The cost of successful defense may be passed on to the estate,¹⁵¹ to the detriment of all those interested in maximizing the pie. Suits for waste or conversion of assets brought into the forum state often assert jurisdiction over property *sub judice* in the appointing court and create a risk of conflicting orders respecting the same asset. Duplication of litigation is quite likely, for the representative is entitled to reimbursement from the estate for liabilities incurred in its behalf, and a suit for conversion may raise questions of will construction or intestate succession that are also in issue in the appointing court. Distribution of the estate must be delayed until the administrator's liability is determined and his claims for reimbursement adjudicated.

It is often argued that jurisdiction in suits concerning assets in the forum state is necessary in order to avoid a "failure of justice": if the administrator has left the appointing state with all the assets, suit must be allowed elsewhere or the plaintiff may be without remedy.¹⁵² But this necessity is of a very low order. The Supreme Court many years ago held that the appointing state's decree against an absent representative is entitled to full faith and credit,¹⁵³ and the argument reduces

¹⁴⁸ *Crowe v. Di Manno*, 225 F.2d 652, 653 (1st Cir. 1955) (tort); *Johnson v. Wallis*, 112 N.Y. 230, 232-33, 19 N.E. 653, 654 (1889) (contract); see GOODRICH, *CONFLICT OF LAWS* 563 (3d ed. 1949).

¹⁴⁹ See *In re Paine's Estate*, 128 Fla. 151, 165, 174 So. 430, 435 (1937); Comment, *supra* note 118, 56 COLUM. L. REV. at 923.

¹⁵⁰ See 1 WOERNER, *THE AMERICAN LAW OF ADMINISTRATION* 572 (3d ed. 1923). This is also true of other decisions permitting foreign administrators to be sued respecting local property. *E.g.*, *Callanan v. Keenan*, 158 App. Div. 84, 142 N.Y. Supp. 561 (1913) (mortgage foreclosure); *McAndrews v. Krause*, 245 Minn. 85, 71 N.W.2d 153 (1955) (contract to bequeath specific property); *Campbell v. Tousey*, 7 Cow. 64 (N.Y. Sup. Ct. 1827) (suit by creditor for judgment against assets collected in forum state or brought there by the representative). In New York these exceptions have been severely limited. *Hill v. Guaranty Trust Co.*, 198 App. Div. 591, 190 N.Y. Supp. 653 (1921).

¹⁵¹ *Cf. Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir. 1936).

¹⁵² See, *e.g.*, *Colbert v. Daniel*, 32 Ala. 314, 331 (1858); *Tunstall v. Pollard's Adm'r*, 38 Va. (11 Leigh) 1, 29-30 (1840); *Campbell v. Tousey*, 7 Cow. 64, 67 (N.Y. Sup. Ct. 1827).

¹⁵³ *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913). This accords with the philosophy of modern long-arm statutes.

to one favoring a "more convenient and effective" remedy.¹⁵⁴ The exceptions themselves, and the arguments made to sustain them, demonstrate that a rather high degree of interference with the ideal of orderly administration will be tolerated in the interest of a convenient forum.¹⁵⁵

Finally, the present system of separate domiciliary and ancillary administrations makes all talk of consolidated claims a bit hollow. Not only must the estate defend against suits brought wherever there are assets—a choice of forum far more difficult to justify in terms of convenience and state interest than the place the cause of action arose—it may have to defend more than once against the same claim, to the detriment of the creditors as well as of the estate, because of the absence of privity between administrations.¹⁵⁶ Abolition of ancillary administration would ameliorate these problems. The question then would be whether the advantages of consolidation are worth the sacrifice of an otherwise appropriate forum. My view, as developed above, is that they often are not.¹⁵⁷

3. *The Appropriate Forum in Suits Against Foreign Representatives*

If immunity is abolished, where should the foreign representative be subject to suit? As in suits against the living defendant, the search

¹⁵⁴ See GOODRICH, *CONFLICT OF LAWS* 564 (3d ed. 1949); McDOWELL 94.

¹⁵⁵ Occasional decisions allowing suit in the absence of an objection by the foreign representative, e.g., *Davis v. Connelly's Ex'rs*, 43 Ky. (4 B. Mon.) 136 (1843) (alternative holding); *Brown v. Brown*, 35 Minn. 191, 28 N.W. 238 (1886); see Annot., 77 A.L.R. 251 (1932), do not substantially infringe on the policy of unitary administration. Jurisdictional objections are usually waivable unless they protect interests not adequately represented by the parties. Compare RESTATEMENT, *CONFLICT OF LAWS* § 81 (1934) (personal jurisdiction), with *Mansfield, Coldwater & L.M. Ry. v. Swan*, 111 U.S. 379 (1884) (diversity). The administrator is trusted to safeguard the interests of beneficiaries and creditors in substantive matters; it would not be odd to trust him also not to sacrifice their interests by consenting to suit in an inappropriate forum.

Cases allowing counterclaims against foreign representative plaintiffs, however, cannot be so easily explained. E.g., *Brown v. Hughes*, 136 F. Supp. 55, 60 (M.D. Pa. 1955). Although a person who is allowed to sue must be said to exist, the representative has not necessarily chosen, as in the ordinary consent case, to forego unitary administration, since he may be present only because the estate's debtor is not subject to process in the appointing state. Moreover, while a setoff against the administrator's claim might be reconcilable with the in rem theory, at least one case has suggested that an affirmative judgment would be allowed, *Palms' Adm'rs v. Howard*, 129 Ky. 668, 102 S.W. 267 (1907), and this interferes with administration just as does an original action.

¹⁵⁶ See Comment, *supra* note 118, 56 COLUM. L. REV. at 927.

¹⁵⁷ Nobody seems willing to carry the argument for unitary administration to its logical extreme of permitting the representative to sue all the debtors of the estate in the appointing court. Yet that court is no less inconvenient, and no less disinterested, as to foreign plaintiffs than as to foreign defendants. To be sure, the burden of travel, like the burden of proof, is often placed on the moving party. But many of the arguments against consolidation of actions by administrators also oppose consolidation of actions against them.

should be for the interested forum. Personal service on the deceased, or on the administrator, in the forum state should be neither necessary nor sufficient; what matter are the connections of the forum state with the cause of action. In claims against the decedent, the long-arm legislatures are quite right that the administrator should be suable where the acts giving rise to the cause of action would have permitted suit against the decedent.¹⁵⁸ In claims arising from acts of the administrator, the interested and convenient forum is likely to be where those acts took place. The justification for allowing suit at a living defendant's domicile is the necessity of at least one certain forum, combined with this state's convenience to the defendant; the analog of domicile in the probate situation is the state of appointment. Moreover, jurisdiction by consent seems wholly unobjectionable; the administrator is trusted to protect the substantive interests of participants in the estate, and he can be trusted to guard their concern for an appropriate forum.

Into the shoes of one dead man it is inappropriate to insert more than one pair of feet. This much is easy. The difficult question is whether the necessity for expeditious distribution of assets justifies denying the plaintiff an otherwise proper forum. The argument for immunity has been more untenable than was necessary, and now the long-arm statutes are rapidly doing away with immunity. I do not think this a cause for lamentation.

¹⁵⁸ See Foster, *Revision Notes*, following WIS. STAT. ANN. § 262.05(11) (Supp. 1964).